Supreme Court, U.S.
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No. 98-1044

In The

Supreme Court of the United States

October Term, 1998

CHI-MING CHOW,

Petitioner,

vs.

VAN BUREN TOWNSHIP; K-MART CORPORATION; and JILL FEHRENBACH,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

RESPONDENTS K-MART CORPORATION AND JILL FEHRENBACH'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether Petitioner has established a jurisdictional basis for the United States Supreme Court to consider his Writ of Certiorari given that the constitutional issues raised in his Writ were never presented to the State Court.

II.

Whether the manner in which the State Court dismissed, by way of summary disposition, Petitioner's claim for malicious prosecution did not violate the Equal Protection Clause of the Fourteenth Amendment as the State Court did not misapply the relevant law in dismissing Petitioner's cause of action and no violation of Equal Protection would exist even if a misapplication of State law did occur.

III.

Whether the State Court's dismissal of Petitioner's malicious prosecution claim by way of summary disposition did not violate the Due Process Clause of the Fourteenth Amendment as Petitioner was provided notice and opportunity to defend the summary disposition motion and there were no impediments on Petitioner's ability to appeal the State trial court's ruling.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents K-Mart Corporation and Jill Fehrenbach respectfully request that this Court deny the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") seeking review of the decision of the Michigan Court of Appeals and denial of an Application for Leave to Appeal by the Michigan Supreme Court.

OPINION BELOW

The decision of the Michigan Court of Appeals, Docket No. 191046 is reprinted in the Appendix to the Petition (hereinafter "Pet. App.") at pages 3a-4a. The Order of the Michigan Supreme Court, Docket No. 110961, denying Petitioner's Application for Leave to Appeal, is reprinted in the Appendix to the Petition at pages 1a-2a.

STATEMENT OF THE CASE[1]

This case arises from an incident which occurred on August 12, 1989, when Petitioner Chi-Ming Chow was

[1] Respondents object to Petitioner's Statement of the Case to the extent it contains Petitioner's arguments regarding the alleged unlawful conduct, malicious intent, etc., of the various parties named as Defendants in the State lawsuit, including Respondents herein. Respondents further objects to Petitioner's reliance on his self-serving correspondence, dated September 14, 1993, and addressed to "Whom It May Concern" (Pet. App. 25a-47a) as support for his assertion as to the alleged unlawful conduct of the Respondents and the other Defendants named in his State lawsuit.

arrested for stealing a pair of shoes from Respondent K-Mart Corporation. The particular K-Mart store is located in Van Buren Township, Michigan.

Respondent Jill Fehrenbach, an employee of K-Mart, observed Petitioner trying on a pair of work shoes and then walking out of the shoe department with the new shoes still on his feet. Petitioner placed his old pair of work boots on the shelf where the new boots had been located. Pet. App. 47a – foldout. Ms. Fehrenbach then contacted K-Mart security regarding Petitioner's attempted theft. Mr. Fred Swift, an employee in K-Mart's Loss Prevention Department, reported that when Petitioner came into the footwear department he tried on three pairs of shoes. Petitioner kept the third pair on his feet and only paid for the first two pairs. Petitioner was detained and the Van Buren Police Department was contacted. Petitioner was turned over to the police upon their arrival. Pet. App. 47a – foldout. When the Van Buren Police Department arrived, they investigated the incident by speaking to Mr. Swift and Petitioner. Following this investigation, the police took Petitioner into custody and brought Petitioner to the police station for the filing of formal charges. Pet. App. 95a – foldout.

Petitioner's criminal trial took place in the 34th District Court, Van Buren Township, Michigan, wherein he was convicted of larceny under One Hundred Dollars. Petitioner appealed his conviction to the Wayne County Circuit Court, which reversed the conviction and remanded the matter for new trial. However, it is important to note that the *sole* basis for the reversal and retrial was the Circuit Court's finding that Petitioner (as the criminal defendant) was denied a fair trial because of ineffective

assistance of counsel. The example cited was the failure by defense counsel to object to inadmissable evidence. Pet. App. 72a-76a. The Michigan Court of Appeals, in an unpublished Opinion dated June 1, 1993 (Docket No. 138701), affirmed the Circuit Court's finding of ineffective counsel and thereby remanded the case for a new trial. Pet. App. 85a-87a.

Following the remand for trial, the criminal proceedings were dismissed, by way of stipulation, for the sole reason that the subject matter of the criminal proceedings, i.e., the stolen work boots, were inadvertently disposed of by the Van Buren Police Department during the pendency of the appeal. Pet. App. 92a-93a. The Police Department disposed of the work boots simply because they believed the criminal proceedings were completed. Pet. App. 82a. The police had no ulterior motive for disposing of the boots.

Following the dismissal of the criminal proceedings, Petitioner, on or about July 28, 1994, commenced a civil suit in the Wayne County Circuit Court by the filing of a Complaint against various Defendants including Respondents K-Mart Corporation and Jill Fehrenbach. Also named as Defendants in the State action were Van Buren Township and the individual Defendants who were the purported agents or employees of K-Mart and Van Buren Township Police Department.

On October 21, 1994, the Wayne County Circuit Court entered an Order quashing service of process in favor of all Defendants, except Van Buren Township. Petitioner subsequently effectively served Defendants K-Mart Corporation and Jill Fehrenbach with his Complaint.

Defendant Van Buren Township then removed this matter to the U.S. District Court for the Eastern District of Michigan. However, in an Order dated January 30, 1995, the Federal District Court remanded this matter to Wayne County Circuit Court on the basis that Van Buren Township's removal petition was not filed in a timely manner.

Following the remand to Wayne County Circuit Court, Defendants K-Mart and Jill Fehrenbach filed a Motion for More Definite Statement on the basis that Petitioner's original Complaint was filed in a vague and cursory fashion, making it impossible for Defendants to file a responsive pleading without forcing them to guess as to the nature of the various claims asserted by Petitioner and which claims were being asserted against which particular Defendant.

In an Order dated February 16, 1995, the Wayne County Circuit Court granted Defendants' Motion for a More Definite Statement, requiring Petitioner to:

1. Identify the parties and state the county of residents.

2. Provide separate paragraphs for each cause of action.

3. Identify what actions were taken by the individual parties which support Petitioner's cause of action as against each particular Defendant.

4. Identify the statutes relied upon by Petitioner to support his claim for relief.

Following the filing of Petitioner's Amended Complaint, Defendants K-Mart and Jill Fehrenbach filed a Motion for Summary Disposition seeking a dismissal of

each count of Petitioner's four-count Complaint, i.e.: Count I – defamation; Count II – malicious prosecution; Count III – violation of the Michigan Consumer Protection Act; and Count IV – violation of civil rights. Defendants sought a dismissal of each cause of action on the basis that Petitioner failed to state a claim upon which relief could be granted. *See* MCR 2.116(C)(8).

Defendant Van Buren Township also filed a Motion for Summary Disposition alleging, in part, that Petitioner's claim against this Defendant was barred by governmental immunity. In an Order dated July 21, 1995, the trial court granted Van Buren Township's Motion for Summary Disposition. In an Order dated July 24, 1995, the trial court granted summary disposition in favor of Defendants K-Mart and Jill Fehrenbach with regard to Petitioner's claims for defamation, violation of the Michigan Consumer Protection Act and violation of civil rights. The trial court denied Defendants' Motion for Summary Disposition with regard to Petitioner's claim for malicious prosecution ruling that his Complaint sufficiently stated a claim upon which relief can be granted.

Defendants Jill Fehrenbach and K-Mart Corporation subsequently filed a Motion for Summary Disposition with regard to Petitioner's remaining claim for malicious prosecution. As to this remaining cause of action, Defendants asserted the lack of genuine issue of material fact mandating a dismissal as a matter of law. *See* MCR 2.116(C)(10).

In an Opinion and Order dated October 20, 1995, the trial court granted summary disposition as to the remaining count for malicious prosecution on the basis that

Petitioner failed to set forth facts establishing each of the four requisite elements for a claim for malicious prosecution. Pet. App. 6a, 17a. Petitioner then filed a Claim of Appeal to the Michigan Court of Appeals from the trial court's order dismissing this remaining count and subsequent order denying Petitioner's Motion for Reconsideration.[2]

In an Opinion dated July 8, 1997, the Michigan Court of Appeals affirmed the trial court's grant of summary disposition in favor of Defendants because of the lack of any genuine issue of fact as to Petitioner's inability to present evidence establishing each of the four necessary criteria for maintaining a cause of action for malicious prosecution. *See, Wilson v. Yono,* 65 Mich. App. 441, 237 N.W.2d 494 (1975). In addition to Petitioner's inability to establish the second criteria for maintaining this cause of action, "termination of the [underlying criminal] proceeding in favor of the accused," the Court of Appeals held that the facts are undisputed regarding Petitioner's inability to establish the "absence of probable cause" criteria. Pet. App. 3a-4a. Specifically, the Court of Appeals ruled:

> Nonetheless, notwithstanding reversal on appeal, which was not for fraud or perjury on

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[2] Petitioner did not appeal from the trial court's previous order dismissing Petitioner's claim for defamation, violation of the Michigan Consumer Protection Act and violation of civil rights. Nor did Petitioner appeal from the order dismissing Van Buren Township on the basis of governmental immunity. As such, Petitioner waived on appeal any objection to the propriety of the above-stated dismissal orders. *See, e.g., Royal Indemnity Co. v. H.S. Watson Co.,* 93 Mich. App. 491, 287 N.W.2d 278 (1979).

> behalf of these appellees, the very fact of conviction conclusively establishes probable cause and thereby precludes a suit for malicious prosecution. *Nawrocki v. Eberhard Foods, Inc,* 24 Mich App 646, 650-651; 180 NW2d 849 (1970).

Petitioner then filed a Motion for Rehearing. In an Order dated September 30, 1997, the Court of Appeals denied Petitioner's Motion. Pet. App. 20a. Petitioner then filed a Delayed Application for Leave to Appeal to the Michigan Supreme Court which was denied in an Order dated July 28, 1998. Pet. App. 1a-2a. Petitioner's Motion for Reconsideration was also denied by way of Order dated September 28, 1998. Pet. App. 21a-22a.

REASONS FOR DENYING THE PETITION

Petitioner now brings his Writ of Certiorari asserting that the legal standard by which the Michigan Court of Appeals affirmed the dismissal of his malicious prosecution claim somehow violated his constitutional rights to due process and equal protection under the Fourteenth Amendment. However, upon closer review of Petitioner's Writ, it is apparent that his purported "federal question" is in reality a thinly veiled attempt to have this Court review a State Appellate Court decision on the basis that the State Court applied or enacted an incorrect legal standard in dismissing Petitioner's state cause of action. Whether or not the Michigan Court of Appeals applied the correct legal standard in dismissing Petitioner's state claim for malicious prosecution is *not*, by definition, a federal question and, therefore, is not an issue appropriate for this Court.

As will be discussed more fully below, there exists additional grounds for the denial of Petitioner's Writ of Certiorari. First, Petitioner's alleged "federal question" was never raised in the State Courts and is therefore not properly presented to this Court. Second, even if it can be argued that the Michigan Courts applied the wrong legal standard in dismissing Petitioner's malicious prosecution claim, the manner in which the state cause of action was dismissed by the trial court, by way of summary disposition, and affirmed on appeal did not violate Petitioner's rights to due process or equal protection.

There can be no dispute that at all levels of the proceedings below, i.e., proceedings before the trial court, Michigan Court of Appeals and Michigan Supreme Court, Petitioner was provided with notice of the proceedings and that the subject matter of these proceedings was the legal viability of his remaining state cause of action. Additionally, at each level, Petitioner was fully provided with the opportunity to defend against the dismissal of his remaining cause of action. Thus, at no point during any of the proceedings below were Petitioner's due process rights ever violated.

Petitioner's equal protection argument is, again, simply based upon his assertion that the Michigan appellate courts misapplied state law in dismissing his malicious prosecution claim. As will be noted below, misapplication of state law cannot be the basis for an assertion of an equal protection violation.

For these reasons, as more fully explained below, the Petition for a Writ of Certiorari must be denied.

I. PETITIONER HAS NOT ESTABLISHED A JURISDICTIONAL BASIS FOR THIS COURT TO CONSIDER HIS WRIT OF CERTIORARI GIVEN THAT THE PURPORTED CONSTITUTIONAL ISSUES RAISED IN PETITIONER'S WRIT WERE NEVER PRESENTED TO THE STATE COURT.

In his Writ of Certiorari, Petitioner asserts that his "federal question" occurred or was created as a consequence of the Michigan Court of Appeals' decision creating a new and more stringent requirement for the maintenance of a state cause of action for malicious prosecution, particularly as it relates to the element that there exists no probable cause for the accusation against the Petitioner. Petitioner interprets the Michigan Court of Appeals' ruling as providing that a reversal of the criminal conviction will not overcome the existence of probable cause unless the conviction was reversed on the basis of fraud or perjury. *See* Petitioner's Writ at 14-15.

Whether or not the Michigan Court of Appeals employed the correct legal standard in affirming the dismissal of Petitioner's malicious prosecution claim, the fact remains that this is not a "federal question" but simply a dispute concerning the correct interpretation and application of the state law governing the maintenance of a state claim for malicious prosecution. However, in an attempt to convert this issue into a "federal question," Petitioner argues that the Michigan Court of Appeals' decision created a federal question because the effect of the decision was to create a "conclusive presumption preventing him from access to the courts, denying him due process of law, and denying him the right

other tort victims have, to sue for damages." Petitioner's Writ at 16.

The statutory basis for Petitioner's assertion as to the existence of a federal question is 28 U.S.C. § 1257(a) which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

A review of the decisions from this Court interpreting section 1257 reveals that in order for a federal question to be properly presented to this Court, the question must be first be raised in the State Court proceedings. As stated in *Adams v. Robertson*, ___ U.S. ___, 117 S.Ct. 1028 (1997):

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. 117 S.Ct. at 1029.

The Court in *Adams* further held that:

> When the highest State court is silent on a federal question before us, we assume that the issue is not properly presented. . . . *Id.*

In *Street v. New York*, 194 U.S. 576 (1969), this Court held that when an issue is presented to this Court, by Writ of Certiorari, which was not presented to the State Court in such a manner that it was necessarily decided by the highest State Court, this Court has "no power to consider it." *Id.* at 581-582. In *Monks v. New Jersey*, 398 U.S. 71 (1970), the Court held that the petitioner could not raise, for the first time on writ of certiorari, his assertion as to the alleged unconstitutional application of a state statute pertaining to the disposition of juvenile defenders, as the state courts were never presented with the opportunity to pass upon this issue.

In the case herein, it is obvious that the manner by which the Michigan Court of Appeals affirmed the Wayne County Circuit Court's dismissal of Petitioner's malicious prosecution claim does not constitute a federal question involving a purported constitutional violation. However, even to assume that the Michigan Court of Appeals' ruling somehow rises to the level of a "federal question," this issue would only be properly before this Court had Petitioner raised these constitutional arguments in his Application for Leave to Appeal to the Michigan Supreme Court. Needless to say, Petitioner's Application to the Michigan Supreme Court is void of any argument that the effect of the Michigan Court of Appeals' decision was to violate his due process rights and/or equal protection rights. Thus, in addition to the fact that the issue now before this Court is not, in reality, a "federal question," the fact that this purported federal question was never raised before the Michigan Supreme Court offers a conclusive basis for this Court to reject Petitioner's Writ of Certiorari.

II. THE MANNER IN WHICH THE STATE COURT DISMISSED, BY WAY OF SUMMARY DISPOSITION, PETITIONER'S CLAIM FOR MALICIOUS PROSECUTION DID NOT VIOLATE EQUAL PROTECTION AS THE STATE COURT DID NOT MISAPPLY STATE LAW IN DISMISSING PETITIONER'S CAUSE OF ACTION AND, ADDITIONALLY, NO VIOLATION OF EQUAL PROTECTION WOULD EXIST EVEN IF A MISAPPLICATION OF STATE LAW DID OCCUR.

In support of his violation of equal protection argument, Petitioner asserts that the effect of the Court of Appeals' ruling was to create a bar to the filing of a civil suit for malicious prosecution, specifically as to those claimants whose underlying criminal conviction was procured through fraud or perjured testimony. Petitioner's Writ at 24. However, as stated below, what Petitioner attempts to "pass off" as a federal question/constitutional issue is in reality a dispute as to the applicable State law governing the maintenance of a malicious prosecution claim.

There is no dispute that the function of the Equal Protection Clause is to measure the validity of classifications created by State law. *Parham v. Hughes*, 441 U.S. 347, 358 (1979). However, as stated by this Court in *Beck v. Washington*, 369 U.S. 541 (1962), the Equal Protection Clause does not require uniformity of judicial decision. Thus, misapplication of State law is not invidious discrimination in violation of equal protection. *See also, Moyer v. State of Delaware*, 452 A.2d 948, 950 (Del. Supr. 1982).

Similarly, in the case at bar, Petitioner's assertion as to the misapplication by the Michigan Court of Appeals

of the law governing the maintenance of a cause of action for malicious prosecution does not rise to the level of any violation of equal protection.

In support of his equal protection argument, Petitioner, in his Writ of Certiorari cites this Court's decision in *Lindsey v. Normat*, 405 U.S. 56 (1972) and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). In *Lindsey*, this Court held that the Equal Protection Clause was violated by state law which required a double-bond from a tenant wishing to appeal from an adverse landlord-tenant decision. In no other type of appeal was there a requirement for a double-bond from the appealing party. In *M.L.B.*, this Court held ~~that the State~~ violated equal protection barring an appeal by an indigent whose parental rights were terminated because of the appealing party's failure to pay the fees for a hearing transcript. The situations in both *Lindsey* and *M.L.B.* are certainly distinguishable from the situation at bar. *Lindsey* and *M.L.B.* involve procedural rules centering around the filing of an appeal which were imposed against only one classification of individuals. In the case herein, Petitioner has not and cannot cite to any procedural rule imposed by the Michigan Courts which are specifically imposed upon malicious prosecution claimants and which bar their ability to appeal from an adverse ruling by the circuit courts. The absence of any allegation as to a procedural impediment to Petitioner's ability to appeal from the circuit court's dismissal Order offers further proof as to the absence of any equal protection violation with regard to the manner in which the Michigan Appellate Courts affirmed the Wayne County Circuit Court dismissal order.

III. THE STATE COURT'S DISMISSAL OF PETITIONER'S MALICIOUS PROSECUTION CLAIM BY WAY OF SUMMARY DISPOSITION DID NOT VIOLATE DUE PROCESS AS PLAINTIFF WAS PROVIDED WITH NOTICE AND AN OPPORTUNITY TO DEFEND THE SUMMARY DISPOSITION MOTION AND THERE WERE NO IMPEDIMENTS ON PETITIONER'S ABILITY TO APPEAL THE CIRCUIT COURT'S DISMISSAL ORDER.

Petitioner's assertion that the Michigan Courts improperly deprived Petitioner of his right to have his tort claim heard at trial is totally without merit. There is absolutely no dispute Petitioner was provided notice of the proceedings relative to the Respondents' Motion for Summary Disposition, filed in the Wayne County Circuit Court, and was afforded ample opportunity to contest Respondents' request for a dismissal of his cause of action. Additionally, there is no dispute as to the absence of any impediment imposed upon Petitioner with respect to his ability to seek appellate review, from both the Michigan Court of Appeals and Michigan Supreme Court, of the circuit court's dismissal order.

As set forth by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the essence of due process is the requirement that a person in "jeopardy of serious loss" be given notice of a case against him and the opportunity to defend. Thus, the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 334, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

This Court in *Mathews* further held that:

> [D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, places and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* at 334 (Citations Omitted).

In *Zimmerman v. Burch*, 494 U.S. 113, 125 (1990), this Court held:

> The basic purport of the constitutional requirement [of due process] is that, before a significant deprivation of liberty or property takes place at the state's hands, the affected individual must be forewarned and afforded an opportunity to be heard "at a meaningful time and in a meaningful manner."

Therefore, procedural due process guarantees an affected individual the right to some form of hearing, with notice and an opportunity to be heard, before he or she is divested of a protected interest. *Cotnoir v. University of Maine Systems*, 353 F.3d 6, 10 (1st Cir. 1994).

In the case herein, Petitioner was provided with constitutional guarantees, the opportunity to be heard "at a meaningful time and in a meaningful manner," at all phases of the State Court proceedings. The fact that Petitioner initiated the appellate proceedings, and the absence of any impediments imposed upon Petitioner's ability to file his appeals conclusively establishes the absence of any due process violation with regard to either the circuit court's dismissal order or the appellate courts' affirmance.

Petitioner's implication that the manner in which his malicious prosecution claim was dismissed, i.e., by way of summary disposition affirmed by the appellate courts, somehow violates a due process right to trial, is totally void of merit. As noted by this Court in *Logan v. Zimmerman Brush Co.*, 459 U.S. 422 (1982) (a case cited in Petitioner's Writ of Certiorari), while a State cannot arbitrarily deprive a citizen of a hearing on a tort claim:

> The state may erect reasonable procedural requirements for triggering the right to an adjudication be they statutes or limitations . . . or, in an appropriate case, filing fees. . . . And the state certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. . . . *Id.* at 437-438.

A "reasonable procedural requirement for triggering the right to an adjudication" certainly also includes dismissal by way of summary disposition either because of the lack of any genuine issue of material fact or failure to state a claim upon which relief can be granted. *See* MCR 2.116(C)(8), (10). It is on the basis of this "reasonable procedural requirement" that the circuit court properly dismissed Petitioner's claim for malicious prosecution and the appellate courts properly affirmed.

CONCLUSION

In this case, no federal question exists, and even if a federal question did exist, it was never properly presented to the State Appellate Courts. For these reasons, Petitioner's Writ of Certiorari must be denied.

Respectfully submitted,

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